No. 68

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 114–119) is reported at 273 F. 2d 699. The findings of fact, conclusions of law, and order of the Board (R. 1–13 are reported at 122 NLRB 396.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1960 (R. 120). Certiorari was granted June 27, 1960, 363 U.S. 837 (R. 122). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) provides that:[1]

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

QUESTION PRESENTED

Whether the National Labor Relations Board, having found that the employer and the union are maintaining a hiring arrangement which unlawfully encourages union membership, may properly require, not only that the parties cease giving effect to the illegal arrangement, but that they refund to the employees dues and other fees paid to the union under that arrangement in order to acquire or retain employment.[2]

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[1] Other relevant statutory provisions are set forth in the Appendix, pp. 38-40, *infra*.

[2] The same issue is presented in No. 85, this Term. However, there the hiring arrangement was illegal because of a failure to contain the Board's *Mountain Pacific* safeguards (the validity of which are involved in No. 64, this Term), whereas here it is illegal because union membership was required as a condition of employment.

STATEMENT

A. THE BOARD'S FINDINGS

Mechanical Handling Systems, Inc. manufactures, designs and installs conveyors and allied equipment (R. 15). On May 10, 1956, it entered into a written contract with petitioner United Brotherhood of Carpenters, whereby it agreed to "recognize the jurisdiction claims of the [Brotherhood] * * * abide by the rules and regulations established or agreed upon by the [Brotherhood] of the locality in which any work of our company is being done, and employ members of the [Brotherhood]" (R. 16, 30). The constitution and trade rules of petitioner District Council,[3] thus incorporated in the contract, provide that union members may not work with a member or ex-member who has been suspended or fined until the fine is paid, and that union members may not work with non-members without permission of the Council (R. 5; 92, 96). They also require that members present working cards to the union steward on the job before going to work, and that members of other locals coming into the area must obtain working cards before seeking employment (R. 5; 90–91, 94–95). The Council, which derives its finances in part from the sale of clearance cards and permits, is given sole right to issue quarterly working cards to locals for members "together with such extra cards as may possibly be required in addition thereto," the local union being held

[3] Petitioner Council has jurisdiction over the Indianapolis, Indiana area. It is composed of delegates from various locals in that area which are affiliated with the Brotherhood, including petitioner Local 60 (R. 18; 89).

strictly accountable therefor (R. 5; 90, 94). The Council is also vested with full control over working cards with authority to revoke, and a clearance card committee is required to examine and pass upon the acceptability of all clearance cards (*ibid.*). Finally, the Council rules require that on all jobs where three or more journeymen carpenters are employed there shall be a foreman of carpenters who must be a member in good standing, and who shall share responsibility with the union steward for enforcement of all trade rules (R. 5; 91–92, 95).

The dues payable to the Local, as a condition of maintaining membership in good standing, is $3.50 per month, and the initiation fee is $125 (R. 95, 100–101; G.C. Exh. 8, Art. VII, Sec. 1, p. 21). Lesser fees and dues are payable by apprentices (*ibid.*). The cost of a "Working Permit," payable by a member working in another jurisdiction is "not less than Seventy-five Cents (75¢) per month, nor more than the monthly dues of the Local Union or District Council," and, if a member less than two years, he shall also "pay any difference in initiation fee * * *" (R. 103–104).

In January 1957, the Company began work on a contract for installation of conveyor equipment in the Ford Motor Company plant in Indianapolis (R. 17; 36). About January 7, Ralph Smith, the Council's president and business agent, and the only person authorized to make contracts on behalf of the Council and Local 60, called upon the Company's superintendent in charge of the Ford Motor Company job,

Sherman Roberts (R. 17; 36–37, 60, 63). Roberts told Smith that the Company intended to abide by the terms of the master contract with the Brotherhood in performance of the installation work at the Ford plant (R. 18–19; 60). Roberts agreed on behalf of the Company to hire all needed millwrights and carpenters through Local 60, and to employ only applicants who brought referral slips from the Local (R. 19; 38, 40–41). Roberts further agreed that wages and working conditions on the Ford job should be governed by the terms of the Council's current contract with the local Building Contractors Association (R. 19; 59, 60, 63–64, 88).

Roberts next asked Local 60 to refer millwrights to the job for immediate work and the Local sent out four or five the following day (R. 17; 38). Thereafter, the Company hired through Local 60 and the Council and, as agreed, took on no carpenter or millwright who did not bring a referral slip from the Local (R. 17–18; 40–44). Both the Council and the Local, in turn, referred and cleared applicants for work on the Ford job (R. 24; 47, 50–51, 52). It does not appear that any non-members were cleared for employment on the project.

Hafford B. Carter had worked for the Company on a project in Louisville, Kentucky, for two and one-half years when his foreman suggested that he apply at the Indianapolis job (R. 20; 66–67). Elza Stevenson had also worked on the Louisville job at various times (R. 76). Neither man was a member of Local 60, although both held membership in other locals affiliated with the Brotherhood (R. 66, 76).

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Late in January 1957, the two applied to Roberts who told them that he would like to employ them when operations began at the Ford plant and suggested that they attempt to get referral cards from the Local (R. 20; 39–40, 53–57, 66–68, 77–78). Roberts added that they probably would have "an awful lot of trouble" in getting the Local to clear them for work on the project (R. 20; 68). Carter and Stevenson then called at the Council's office. There a person in charge telephoned Roberts, who said that he would have work for them the following week (R. 20; 69–70, 78–79). The men were refused referrals at this time and returned to Louisville (R. 20; 70, 79).

On February 5, Carter telephoned Roberts and learned that he now had plenty of work and wanted both Carter and Stevenson to start on the job the next day (R. 20–21; 70). When Carter and Stevenson reported at the project on the following day, Roberts again voiced a fear that the men would have trouble "trying to get through the union" but thought that he would "give it a try" (R. 21; 71–72, 79–80). He then wrote Smith, requesting working permits for both men and describing them as "good conveyor men" who had worked for the Company before (R. 21; 72, 80–81).

Carter and Stevenson presented this letter to Local 60's financial secretary, who referred them to the office of the Council (R. 72, 81). The two applicants then called on Smith at the Council's office and asked him for referrals. Smith, however, said that he must first check with Roberts and told the men to come back the next day. When they returned the following

day, however, Smith refused to give them referrals to the job, and they never obtained employment there (R. 21–22; 62–63, 73–74, 74–75, 81–84.)

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon these facts, the Board concluded that the master contract between the Company and the Brotherhood, together with the oral agreement between the Company, Local 60 and the Council covering the hiring of employees, had the effect of making employment at the Company's project at the Ford plant conditional upon membership in Local 60, and thus constituted "a single comprehensive scheme for complete evasion of the statutory ban on closed shops" (R. 5–6).[4] The Board therefore held that the unions,[5] by maintaining this contractual arrangement, were causing discrimination in violation of Section 8(b)(2) and (1)(A) of the Act, and that the application thereof to prevent the employment of applicants Carter and Stevenson similarly violated these statutory provisions (R. 6).[6]

The Board's order (R. 8–10) required the Brotherhood, the Council and Local 60 to cease and desist

[4] The Trial Examiner had found that the oral hiring agreement between the Company, Local 60 and the Council unlawfully conditioned employment on union membership, but dismissed the complaint as to the Brotherhood, concluding that there was no connection between the two contracts (R. 23).

[5] No charge was filed against the Company (Tr. 176).

[6] The Brotherhood, the Council and Local 60 were collectively found to bear responsibility for all the unfair labor practices found except that, since Stevenson did not file a charge against the Brotherhood, no finding was made against the Brotherhood respecting the discrimination against Stevenson (R. 6).

from making, maintaining or enforcing any agreement which illegally conditioned employment upon union membership, and from in any like or related manner interfering with the employees' Section 7 rights. Moreover, the unions were required to make Carter and Stevenson whole for any loss of earnings they may have suffered as a result of the discrimination against them, and to notify them that henceforth they would not unlawfully be denied work referrals.

In addition, the Board found that (R. 7):

> * * * dues, non-membership dues, assessments, and work permit fees, were collected under the illegal contract as the price employees paid in order to obtain or retain their jobs, [and that it] would [not] effectuate the policies of the Act to permit the retention of the payments which have been unlawfully exacted from the employees.

Accordingly, the Board further ordered the three unions (*ibid.*) "jointly or severally, to refund to the employees involved the dues, non-membership dues, assessments, and work permit fees, paid by the employees as a price for their employment."[7]

C. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals sustained the Board's unfair labor practice findings and enforced its order in full (R. 114–119). Respecting the reimbursement provisions of the order, the court stated (R. 118–119):

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[7] In accordance with Section 10(b) of the Act, the Board limited this provision of the order to monies collected within the period beginning six months preceding the date of service of the original charge against each union (R. 7, n. 5).

> Respondents argue that the evidence fails to show any dues, assessments and fees exacted under the agreements found to be unlawful; that on the contrary, all such fees were paid voluntarily. However, in our opinion, the record does support the Board's finding that such fees were coerced in that there was present an implicit threat of loss of jobs if those fees were not paid. The rules of the Council and Local 60 provided for supervision on the job to prevent any but local union members in good standing from working. The three respondents had full control of employment of millwrights and carpenters on the Ford job, even to veto * * * the Company superintendent's wishes to hire two former employees, both members of other locals affiliated with the same International. * * * Respondents argue that the affected employees were already union members when the agreements were made and hence could not have been forced to join by the agreements. They were, however, deprived of their right to resign. The burden rested on respondents to show that even without the unlawful discrimination, the Company's employees would have maintained their membership in Local 60. * * *

Accordingly, the court concluded that reimbursement of fees was "a proper and appropriate remedy to restore employees to the position they would have enjoyed but for the illegal practices" (R. 119).

SUMMARY OF ARGUMENT

The issue here is whether the Board, as a means of eradicating the effects of a hiring arrangement which

unlawfully encourages union membership, may properly require, not only that the employer and the union cease such activity in the future, but that they reimburse the employees for dues and fees paid to the union under that arrangement while it was in effect. It is the Board's position, accepted by the court below, that such a reimbursement remedy is within the Board's powers under Section 10(c) of the Act, and that thus the reimbursement part of its order here and in No. 85 is entitled to stand.

A. As this Court stated in *Virginia Electric and Power Company* v. *National Labor Relations Board*, 319 U.S. 533, 540, in sustaining the Board's power to order reimbursement of dues and fees paid to a labor organization, such order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." No such showing can be made here.

In 1956, finding that, despite the ban which the Taft-Hartley amendments had imposed nine years earlier, closed-shop practices were still rampant, the Board concluded that a remedy more effective than a cease and desist order was required if such practices were to be curtailed and the statutory policy which they impaired vindicated. Accordingly, in the *Brown-Olds* case, 115 NLRB 594, the Board announced that, where, as here, the parties had entered into an arrangement which required an employee to be a union member in order to secure and retain employment, the policies of the Act would best be served by requiring a reimbursement of the dues and fees

paid to the union under that arrangement. And, thereafter, in *Los Angeles-Seattle Motor Express*, 121 NLRB 1629 (the case involved in Nos. 64 and 85), the same remedy was extended to hiring arrangements which, though not operated as a closed shop, had the same effect on employees because they failed to contain adequate safeguards that the union's exclusive control over hiring would be exercised without regard to union membership considerations.

It is apparent that employees and unions would be more reluctant to enter into or continue illegal hiring arrangements if they know that they will be required to refund monies collected thereunder, than they would be if the risk were merely a cease and desist order. From this standpoint, the reimbursement remedy for hiring arrangements which give the union an unlawful control over initial employment thus effectuates the statutory policy of protecting "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" (Act, Section 1). Moreover, such a reimbursement remedy is reasonably related to the right which it purports to vindicate.

Thus, where, as here, employees are required to be union members to obtain jobs, or where, as in No. 85, they are led to believe that this is necessary, they are encouraged to become union members, or, if they are members, to retain that membership in good standing. The way in which union membership is acquired or maintained is by paying initiation fees and periodic dues to the union. A refund of the dues and fees collected under the illegal arrangement hence merely

"returns to the employees what has been taken from them" under the illegal practice and thereby restores "to the employees that truly unfettered freedom of choice which the Act demands." *Virginia Electric and Power Company* v. *National Labor Relations Board*, 319 U.S. 533, 541.

B. The argument that a reimbursement remedy for hiring practices which illegally encourage union membership is improper rests primarily on the premise that the Board may order dues and fees to be refunded only if they were exacted under coercion, and such coercion may not be shown to exist where, as here and in No. 85, the employees were union members before they were subjected to the illegal hiring arrangement in question. This overlooks the fact that, even if the employee were already a union member, the arrangement can still have a coercive impact on him. For, by requiring the employee to retain his union membership as a condition of employment, or leading him to believe that this is necessary, the illegal arrangement deprives him of his right to refrain from union activity without imperiling his job opportunities.

In any event, as we read the opinion for the Court in *Virginia Electric*, 319 U.S. 533, the validity of a reimbursement order is not contingent upon a showing that the employees paid the money to the union unwillingly. If the money were paid pursuant to an arrangement which violated the statute, it can be ordered refunded provided this would best effectuate the statutory policies. For, even if many of the employees would have paid dues and fees to the union

anyhow, this does not privilege the use of an illegal procedure to collect that money, nor bar a remedy which will fully and effectively neutralize the impact of such unlawful action. Nor is *Virginia Electric* distinguishable on the ground that the union there was company-dominated. The dominated character of the union was simply the unfair labor practice which brought the Board's remedial power into play there; the power is no less when, as here, it is brought into play by hiring practices which unlawfully encourage union membershsip.

C. The Board's reimbursement remedy is proper though it fails to deduct the benefits which the employees may have obtained from the union as a result of the duties and fees paid. Even if the benefits "purchased" with the fees and dues paid to the union could be accurately ascertained, the Board would still be warranted in not taking them into account. The monies collected under the illegal hiring arrangement went for a group of benefits, which were not severable. Along with the job, the employee may have obtained insurance and other benefits, but he could not pick what he would receive for the dues and fees paid; he bought either the whole package or none of it. Since the hiring arrangement was an illegal means of exacting the fees and dues, it could not have been used to purchase any part of the package, no matter how advantageous.

Nor can petitioners be relieved of the responsibility for refunding dues and fees which were unlawfully collected by pleading hardship. Should hardship develop in making the payments, this is a matter which

can be worked out at the compliance stage of the proceeding.

ARGUMENT

THE BOARD MAY PROPERLY REQUIRE THAT EMPLOYEES BE REIMBURSED FOR DUES AND FEES PAID TO THE UNION UNDER AN ILLEGAL HIRING ARRANGEMENT

INTRODUCTION

The facts summarized in the Statement show, and petitioners do not contest, that they had an agreement with Mechanical Handling Systems which required employees to be members of Local 60 in order to obtain employment on the Ford job, and that, pursuant to this agreement, employment was denied to two employees who were members of a local other than Local 60.[8] There is no question that a closed-shop arrangement of this type encourages union membership in violation of Section 8(a)(3) of the Act, and restrains employees in the exercise of their rights, guaranteed by Section 7, to join or assist labor organizations, or to refrain from such activity.[9] The issue here is

[8] Petitioners' suggestion (Br. 4) that the employees were denied employment because priority was accorded to other men who were waiting for work longer is contrary to the findings made by the Board and affirmed by the court below. On these findings, which are not open to contest here, the two employees were denied referral because they were not members of, or in good standing with, Local 60. In other words, the basis for referral was not the length of time an employee was out-of-work in the area but rather membership in Local 60.

[9] See *National Labor Relations Board* v. *Eichleay Corp.*, 206 F. 2d 799, 802–803 (C.A. 3); *National Labor Relations Board* v. *McGraw & Co.*, 206 F. 2d 635, 638–639 (C.A. 6); *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2); *National Labor Relations Board* v. *Shuck Construction Co.*, 243 F. 2d 519, 520–521 (C.A. 9).

whether the Board, as a means of eradicating the effects of the illegal hiring arrangement, may properly require, not only that the employer and the union cease such activity in the future, but that they reimburse the employees for dues and fees paid to the union under that arrangement while it has been in effect.[10] The same issue is presented in *National Labor Relations Board* v. *Local 357, International Brotherhood of Teamsters,* No. 85, this Term, where the Board imposed the same remedy for a hiring arrangement which, though not operated as a closed shop, likewise illegally encouraged union membership by giving the union exclusive control over hiring and not providing adequate safeguards to insure that this power would be exercised without regard to the job applicant's union status.[11] In view of the similarity of the prob-

[10] Subject, of course, to the six-month limitation imposed by Section 10(b) of the Act.

[11] The propriety of a reimbursement remedy for hiring arrangements which unlawfully encourage union membership is also involved in the following additional cases, in which Board petitions for certiorari are pending: *National Labor Relations Board* v. *American Dredging Co.*, 276 F. 2d 286 (C.A. 3), No. 123, this Term; *National Labor Relations Board* v. *United States Steel Corp.*, 278 F. 2d 896 (C.A. 3, *en banc*), No. 228, this Term; *National Labor Relations Board* v. *Local 1566, International Longshoremen's Assn.*, 278 F. 2d 883 (C.A. 3), No. 285, this Term; *National Labor Relations Board* v. *Local Union No. 85, Sheet Metal Workers Assn.*, 274 F. 2d 344 (C.A. 5), No. 89, this Term; *National Labor Relations Board* v. *Millwrights' Local 2232*, 277 F. 2d 217 (C.A. 5), No. 229, this Term; *National Labor Relations Board* v. *Local Union 450, Operating Engineers*, 46 LRRM 2611 (C.A. 5), No. 467, this Term; *Morrison-Knudsen Co.* v. *National Labor Relations Board*, 275 F. 2d 914 (C.A. 2), No. 120, this Term.

lem in both cases, the instant brief will treat the remedy issue in No. 85 as well.[12]

We will show that a reimbursement remedy for hiring arrangements which unlawfully encourage union membership is within the Board's power under Section 10(c) of the Act, and that thus the reimbursement part of its order here and in No. 85 is entitled to stand.

A. A reimbursement remedy effectuates the policies of the Act and is a reasonable means of redressing the employee rights which were infringed

Section 10(c) of the Act provides that, if the Board finds that a person has committed an unfair labor practice, it shall issue:

> * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

The Board has wide discretion in ordering affirmative action, including the power to require reimbursement of dues and fees paid to a labor organization. As this Court stated in *Virginia Electric and Power Co.*, 319 U.S. 533, in sustaining a reimbursement remedy, such order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies

[12] No. 85 is combined with No. 64. The Board's brief in those cases will thus be devoted to the substantive issue raised by No. 64, namely, the validity of the Board's *Mountain Pacific* standards for exclusive hiring arrangements (see Un. Br. in Nos. 64 and 85, p. 50).

of the Act" (at p. 540). No such showing can be made here.

One of the declared policies of the Act is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" (Section 1). This policy is further reflected in Section 7 of the Act, which specifically guarantees these rights to employees, and adds that they shall include "the right to refrain from any or all such activities." There can be no more flagrant impairment of this freedom than to require employees to become union members as a condition of employment. Similarly, a hiring arrangement, such as exists in No. 85, which, although it does not require, leads employees to believe that they have to be a union member to get a job, abridges these employee rights. Accordingly, an order compelling the parties to cease and desist from continuing such practices would clearly effectuate the policies of the Act and hence be within the Board's authority.

However, in "fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience" (*National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346). In 1956, finding that, despite the ban which the Taft-Hartley amendments had imposed nine years earlier, closed-shop practices were still rampant,[13] the Board concluded that a remedy more

[13] As two disinterested authorities have noted (Haber and Levinson, *Labor Relations and Productivity in the Building Trades* (Univ. of Michigan, 1956), pp. 62, 71):

effective than a cease and desist order was required if such practices were to be curtailed and the statutory policy which they impaired vindicated. Cf. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. at 347–348. Drawing upon the precedent established in *Virginia Electric, supra,* the Board decided that an appropriate additional remedy would be to require that monies paid to the union under the illegal arrangement be refunded to the employees.

The Board first announced this decision in *United Association of Journeymen, etc., and Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594 (1956), a case which involved closed-shop hiring practices similar to those here. The Board stated (at pp. 600–601):

> * * * the Taft-Hartley amendments have made unlawful all closed-shop contracts as contrary to public policy; proscribing such conduct by unions as unfair labor practices. The dues

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> [By 1945], the closed shop had become one of the basic features of industrial relations in the building industry. This situation has largely remained true in practice up to the present time, despite the passage of legislation in 1947 prohibiting this type of provision from being included in collective agreements.
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> * * * * *
>
> * * * In all of the strongly unionized areas studied during the summer of 1952, employment arrangements equivalent to those under a closed shop were in effect. Membership in the union was almost universally regarded as a prerequisite for obtaining employment; in most instances men were employed directly or indirectly through the union itself. *Both parties viewed this as standard practice and showed little or no concern for the illegality of the arrangement.* [Emphasis added.]

See also, the Board's Brief in Nos. 64 and 85, pp. 32–33.

required and collected under such a contract, and all assessments under any contract,[14] contravene that public policy. It is no longer required by the Act that the union be company-dominated in order for collection of dues to be unlawful under a closed shop contract. Here, the dues and assessments were required and collected pursuant to a contract which clearly contravened the public policy of the Act. Dues and assessments here collected constituted the price these employees paid in order to retain their jobs. We therefore conclude that the remedy of reimbursement of all such monies is appropriate and necessary to expunge the illegal effects of the unfair labor practices found here.

* * * * *

It is our view that, where payment of dues is required under a closed-shop contract, as where assessments are required under an otherwise valid agreement, reimbursement of such monies actually collected will best effectuate the policies of the Act. Otherwise the very fruits of the unfair labor practice itself will remain in the hands of the respondent * * * [Footnotes omitted].

And, thereafter, the same remedy was extended to hiring arrangements which, though not operated as a closed shop, had the same effect on employees because they failed to contain adequate safeguards that the

[14] Even under the limited type of union-security arrangement permitted by Section 8(a)(3) of the Act, the union is entitled to impose only the obligation "to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

union's exclusive control over hiring would be exercised without regard to union membership considerations. *Los Angeles-Seattle Motor Express,* 121 NLRB 1629, 1631 (1958) (this decision is involved in Nos. 64 and 85).

The Board, however, does not apply its reimbursement remedy in every situation where employees have been unlawfully encouraged to join a union, but only in those where, as here and in No. 85, the violation has been of a substantial nature and in obvious disregard of the employees' statutory rights. Thus, in *Philadelphia Woodwork Co.,* 121 NLRB 1642 (1958), issued the same day as *Los Angeles-Seattle,* the Board declined to order the reimbursement of dues and fees paid to a union under a union-security agreement, which, though it afforded employees the 30-day grace period required by Section 8(a)(3), was nevertheless illegal because the union was not in compliance with the filing requirements of Section 9 (f), (g) and (h) when the contract was executed.[15] The Board held that there, unlike the closed shop arrangement in the *Brown-Olds* case which constituted a flagrant impairment of employee rights in open defiance of statutory policy, the substantive content of the union-security clause did not exceed the permissible limits of the statute and the violation found was only "technical in nature" (121 NLRB at 1645). Similarly, in *Chun-King Sales, Inc.,* 126 NLRB No. 98 (1960), 45 LRRM 1392, the Board declined to order a reimbursement

[15] This condition for the validity of union-security agreements has been eliminated by the 1959 amendments to the Act. 73 Stat. 519, Sec. 201 (d), (e).

remedy where the union-security provision, although it did not require employees to be union members to get a job, gave them less than the full 30 days permitted by Section 8(a)(3) to decide whether they desired to join. The Board distinguished the situation in which the *Brown-Olds* reimbursement remedy was applied on the ground that here, unlike there, the union-security clause "does not either condition initial employment upon union membership, or in any way grant to the Union control over the hiring of employees" (45 LRRM at 1394).[16] And recently, in *Hooker Chemical Corporation*, 128 NLRB No. 133 (1960), 46 LRRM 1447, where the Board again refused to order reimbursement where the union-security provision was invalid only because of the union's non-compliance with the former filing requirements, it summed up its position as follows (46 LRRM at 1449):

> * * * the Board does not hold that every invalid union security agreement warrants application of such a remedy. Rather the Board has held that a *Brown-Olds* reimbursement remedy is warranted where the agreement or practice makes union membership or union clearance a condition of obtaining employment and that such remedy is not warranted where, as here, the agreement or practice is unlawful for some reason not involving a limitation on the right to obtain employment. [Footnotes omitted.]

[16] See also, *Nordberg-Salah Fruit, Inc.*, 126 NLRB No. 89 (1960), 45 LRRM 1381; *Orfeo Kostrencich*, 127 NLRB No. 10 (1960), 45 LRRM 1500.

It is apparent that employers and unions would be more reluctant to enter into or continue illegal hiring arrangements if they know that they will be required to refund monies collected thereunder, than they would be if the risk were merely a cease and desist order. From this standpoint, the reimbursement remedy for hiring arrangements which give the union an unlawful control over initial employment thus effectuates the statutory policy described p. 17, *supra*. Of course, "it is not enough to justify the Board's requirements to say they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 12. The remedy must, in addition, be reasonably related to the right which it purports to vindicate. Cf. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 236. A reimbursement remedy for illegal hiring arrangements satisfies this test too.

Where, as here, employees are required to be union members to obtain jobs, or where, as in No. 85, they are led to believe that this is necessary, they are, as noted previously, encouraged to become union members, or, if they are members, to retain that membership in good standing. The way in which union membership is acquired or maintained is by paying initiation fees and periodic dues to the union. Accordingly, there is a causal connection between the

unfair labor practice of requiring or inducing employees to become or remain union members in good standing to get a job, and the payment of dues and fees to the union. The unfair labor practice is such that, irrespective of whether these monies would have been paid for other reasons, it insures, by at least furnishing strong additional encouragement, that they will in fact be paid. At the same time, a refund of the dues and fees paid under the illegal arrangement is a fair measure of the unfair labor practice, because this is exactly what it cost the employee to acquire or maintain his union membership in good standing and thus obtain his job.

In sum, a refund of dues and fees paid to the union in order to secure employment merely "returns to the employees what has been taken from them" under the illegal practice and thereby restores "to the employees that truly unfettered freedom of choice which the Act demands" (*Virginia Electric and Power Co. v. National Labor Relations Board*, 319 U.S. 533, 541). Moreover, insofar as other employees may have been deterred by the illegal union membership requirement from seeking employment with the particular employer, the reimbursement of dues and fees to the employees who were required to pay them in order to get jobs affords the former convincing assurance that their statutory rights will be protected and thus tends to encourage them to seek employment which they would not otherwise deem attainable.

For these reasons, the court below and the First Circuit in *National Labor Relations Board v. Local 111, United Brotherhood of Carpenters*, 278 F. 2d 823,

have held that a refund of dues and fees is a permissible remedy for a hiring arrangement which conditions employment upon union membership.[17] The remedy, however, has been rejected by other circuits in situations similar to those here and in No. 85 (Un. Br. 12-14; n. 11, *supra*). We submit that these decisions rest on fundamental misconceptions concerning the scope of the Board's remedial power and the holding of this Court in *Virginia Electric, supra.*

B. If the propriety of the reimbursement remedy is dependent on a showing that the dues and fees were coerced, such a showing can be made. However, proof of coercion is not essential.

The basic reason for the conclusion that reimbursement of union dues and fees is an inappropriate rem-

[17] Contrary to petitioners' suggestion (Br. 12, n. 7), the First Circuit did not simply enforce the reimbursement order because no exceptions were filed thereto. Despite the absence of exceptions, it undertook to determine the question on the merits. Thus, the court (in an opinion by Judge Aldrich), after noting that it declined to enforce a reimbursement order in *National Labor Relations Board* v. *Local 476, United Brotherhood of Carpenters*, 276 F. 2d 583, 586, which involved an exclusive hiring hall agreement that did not have the Board's *Mountain Pacific* safeguards, stated (278 F. 2d at 825):

> The findings in the case at bar go far beyond that. * * * An open-ended list whereby local members coming in later are placed ahead of non-members waiting for work simply because they are local members is the clearest kind of illegal preference. * * * In the light of such barefaced, fundamental violation, the disgorgement order is not governed by our decision in *Local 476*. On the contrary, we could refuse to enforce the Board's order only if it must be ruled that the Board could never determine such relief to be proper. We would not so hold. *N.L.R.B.* v. *Local 60* * * *, 7 Cir., 1960, 273 F. 2d 699; cf. *Virginia Electric & Power Co.* v. *N.L.R.B.*, 1943, 319 U.S. 533.

edy for a hiring arrangement which unlawfully encourages union membership is that where the employees involved are already union members, it cannot be found that the illegal arrangement *actually coerced* them into paying dues and fees to the union. That is, it is assumed that the Board may order dues and fees to be refunded only if they were exacted involuntarily. It is then argued that no showing of actual coercion can be made where, as here and in No. 85, the employees appear to have joined the union before they were ever subjected to the illegal hiring arrangement in question. For, since employees join a union to obtain benefits and not merely to avoid discrimination, long-time union members would in all probability continue to pay dues and fees irrespective of the conditions imposed by the hiring arrangement (Un. Br. 14–28).

1. Assuming that a showing of actual coercion is necessary, it does not follow that, just because an employee was a union member before he is subjected to a hiring arrangement which unlawfully encourages union membership, the arrangement will have no coercive effect on him. As the court below noted (R. 118–119), the illegal arrangement here requires the employee to *retain* his union membership in order to obtain and keep employment,[18] thereby depriving him of his right to refrain from union activity without imperiling his job opportunities. See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S.

[18] Similarly, the hiring arrangement in No. 85 leads a union employee to believe that his membership must be maintained to get referred for work.

17, 39–40. Nor is it "fanciful," as petitioners contend (Un. Br. 21–22), to expect that a long-time union member might cease paying dues to the union once it was evident that such payments were no longer necessary to obtain employment. Petitioners overlook the fact that in an industry like the construction industry, where closed shop practices have a long history,[19] one of the chief reasons for joining the union was to obtain a job.[20] The Taft-Hartley amendments, which abolished the closed shop, were, of course, designed to free building trades employees from this compulsion no less than other employees.[21] A hiring arrangement which does not condition employment on union membership would not only further that objective, but would thus eliminate a significant "inclination that

[19] See Haber, *Industrial Relations in the Building Industry* (Harvard, 1930), pp. 238–240, 245; Haber and Levinson, *Labor Relations and Productivity in the Building Trades* (Univ. of Michigan, 1956), pp. 62, 71.

[20] This also holds true for No. 85, for, as shown in our brief in Nos. 64 and 85 (pp. 30–33), in industries where jobs are obtained through union controlled hiring halls the closed shop historically has been an adjunct of the hiring hall.

[21] See S. Rep. No. 105, 80th Cong., 1st Sess., pp. 5–7, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 411–412.

Nor is a different conclusion required by Section 8(f), added by the 1959 amendments (Un. Br. 29). Although Congress there permitted an employer in the building and construction industry to recognize a union as the representative of his employees prior to their actual hire, it did not relax the ban on requiring union membershsip as a condition of employment. It merely shortened, from 30 to 7 days, the period afforded to employees, under the limited type of union-security permitted by Section 8(a)(3), to decide whether they desired to join the union after obtaining employment (Section 8(f)(2)).

prompted [the employee] to join" in the first place (Un. Br. 22). On the other hand, so long as the job motive for maintaining union membership persists, it cannot be said with certainty—particularly since employee testimony under these circumstances would be of little probative value[22]—that the other reasons for joining a union would in themselves be sufficient to induce the employee to continue his dues payments to the union.[23] Accordingly, it is fair to conclude that the illegal hiring arrangement here did exert a coercive impact on the employees though they may already have been union members, inducing them to retain

[22] A "'sense of constraint * * * is a subtle thing, and the recognition of constraint may call for a high degree of introspective perception.'" *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 231. See also, *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 51.

[23] The statistics cited by petitioners (Br. 17) showing that employees overwhelmingly authorized union shops when they were polled on this issue under Section 9(e) of the Act, do not impair the above analysis. Such elections were held only after the employees had first been hired without regard to union membership and had then freely selected the union as their representative. It is one thing to regard a decision to pay dues to a union as voluntary in that situation, and quite another to regard it as voluntary where, as here, entry to the job itself was contingent upon union membership in good standing.

Likewise irrelevant are the election results in the *American Dredging* case (Un. Br. 22–23, n. 28). For, in view of the Third Circuit's refusal to enforce the reimbursement remedy (the propriety of which is before this Court in No. 123), the election was held under circumstances which the Board would not ordinarily regard as adequate to insure a free choice. In other words, had the Board been able to require a refund of dues and fees prior to the election, the election results might well have been different.

that membership in good standing in order to obtain and keep their jobs.[24] Cf. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872, certiorari denied, 304 U.S. 576.

2. In any event, we submit that proof that the illegal hiring arrangement coerced employees into paying dues and fees to the union is not necessary to

[24] Petitioners misconceive the basis for the Board's unfair labor practice finding in the hiring hall cases, in contending (Br. 24) that the justification for a refund order in No. 85 is even less than that in the instant case. Thus, petitioners assert that, in the Board's view, the delegation of exclusive hiring authority to a union is unlawful because it may be presumed that "the union will operate the referral system discriminatorily"; the addition of the *Mountain Pacific* safeguards would not cure such a propensity to discriminate, and hence the presence or absence of such safeguards can have no bearing on whether employees would be more or less likely to pay dues to the union. However, as more fully set forth in our brief in No. 64, the Board's *Mountain Pacific* doctrine does not rest on presumed union discrimination. In the Board's view, the mere existence of an exclusive hiring hall constitutes discrimination within the meaning of Section 8(a)(3) because it denies employment to employees who seek work directly, without going through the hiring hall. This discrimination, moreover, would tend to encourage union membership, thereby adding the second element required for a violation of Section 8(a)(3). The *Mountain Pacific* standards come in with respect to the latter element, i.e., by affording adequate assurance to employees that the union's power will be exercised without regard to union considerations, they negative the unlawful encouragement which would otherwise flow from the existence of the hiring hall itself. Since the *Mountain Pacific* standards thus affect the amount of union encouragement generated by the vesting of exclusive hiring authority in the union, their presence or absence would influence the employees to join the union and pay dues to it, and old-time members to retain their membership in good standing, to the same extent as would the presence or absence of the closed shop arrangement involved here. See also, n. 20, p. 26, *supra*.

sustain a reimbursement order. For, as we read *Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, it holds that a reimbursement order may be proper without a showing that, but for the unlawful discrimination, any particular recipient of reimbursed monies would not have paid them.

In *Virginia Electric*, the Board, as a remedy for a situation where the employer had given a closed-shop contract to a union established in violation of Section 8(a)(2), ordered that the employer cease giving effect to the contract and reimburse the employees for dues which had been checked off in favor of the union. In opposition to the reimbursement order, it was contended that, since the employees had voluntarily authorized the check-off and they had received substantial benefits from the union, a return of the money to them would be a windfall absent proof, in each individual case, that the money was actually paid unwillingly. This issue split the Court three ways. The dissenting justices (319 U.S. at 546–550) agreed that a specific showing of coercion was required, and voted to set aside the reimbursement order because such showing had not been made. Mr. Justice Frankfurter, who went with the majority, wrote a special concurrence (*id.*, at 545–546), on the ground that, though a specific showing of coercion was required, the closed-shop contract established the requisite coercion. The remaining five members of the majority, however, in an opinion written by Mr. Justice Murphy, held that the propriety of the reimbursement order did not turn on whether "damages [were] actually sustained" by each beneficiary; that this position wrongly conceives

of the reimbursement order as "compensation for private injury" (319 U.S. at 543). In their view, rather, the remedy should be sustained "unless it can be shown that [it] is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*id.*, at 540). And, applying that test, they concluded that no such showing could be made there.

Thus, the opinion for the Court in *Virginia Electric* states (319 U.S. at 543):

> The instant reimbursement order is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights * * *. For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and

> knowledge. The Board has here determined that the employees suffered a definite loss in the amount of the dues deducted from their wages and that the effectuation of the policies of the Act requires reimbursement of those dues in full. We cannot say this considered judgment does not effectuate the statutory purpose.

In short, as we read the majority opinion in *Virginia Electric*, the validity of a reimbursement order is not contingent upon a showing that the employees paid monies to the union unwillingly. If the money were paid pursuant to an arrangement which violated the statute, it can be ordered refunded provided this would best effectuate the statutory policies. For the employees may be deemed to have suffered a "loss" by being subjected to an arrangement which impairs their statutory rights. That is, even assuming that many of the employees in this case would not have dropped out of the Union had they not been under compulsion to stay in, the fact would remain that the Company and the Union had entered into an arrangement violative of the Act's guarantee against discrimination, and that dues and fees had been paid by employees, willingly or not, pursuant to the illegal arrangement. That the money may have been collected anyhow by a legal means does not privilege the use of an illegal procedure to obtain it. Nor does this circumstance militate against a remedy which will fully and effectively neutralize the impact of the illegality and vindicate the public rights conferred by the Act. And, as we have shown (pp. 17–20), a reimbursement order is necessary to achieve this result with respect to illegal hiring arrangements.

To be sure, the union in *Virginia Electric* was company dominated, whereas those here and in No. 85 are not. But, for the reasons advanced above, we believe that, contrary to the view of petitioners and the courts which have distinguished *Virginia Electric* on that ground (Un. Br. 44–47), the opinion of the Court does not turn on the company domination. The domination of the union was simply the unfair labor practice which brought the Board's remedial power into play. Collection of dues by and on behalf of a dominated union was a means of furthering such unfair labor practice, and thus the Board could appropriately require reimbursement of such monies. Here, closed-shop practices are the violation which the Board is required to remedy. And, here too, collection of fees and dues are an integral aspect of, and means of implementing, the illegal arrangement. Hence, the reimbursement remedy is equally appropriate here. Perhaps, the dominated nature of the union emphasized the flagrant impairment of employee rights and statutory policy which had occurred in that case, and thus made it easier to see that a reimbursement remedy was necessary to redress the wrong. However, though the hiring practices here may have infringed these rights and policies less dramatically, they have nonetheless done so in a substantial manner, and, as we have shown, a reimbursement remedy is needed adequately to correct the situation. In these circumstances, we read *Virginia Electric* as privileging a reimbursement remedy, even though the union involved is not company dominated.

This conclusion is supported by the cases (Un. Br. 46–47, n. 44) in which a reimbursement remedy has been sustained without a showing of that factor. Thus, in *National Labor Relations Board* v. *Revere Metal Art Co.*, 280 F. 2d 96 (C.A. 2), petition for certiorari pending on another point, No. 412, this Term, the employer recognized a minority union and gave it a contract requiring employees to join the union. The Board, finding that this contract was violative of the Act, ordered the employer and the union to reimburse the employees for dues and fees paid to the union while the contract was in effect, including those employees who had joined the union prior to September 1, when the contract became effective. The Second Circuit, though declining to enforce a reimbursement order in the situation here,[25] nevertheless enforced the order in *Revere*. The court stated (280 F. 2d at 101):

> * * * For the courts to require a determination of the attitude of each employee in every case would impose impossible administrative burdens * * *. We have been admonished that although orders requiring reimbursement to employees for dues paid to unions unlawfully forced upon them "somewhat resemble compensation for private injury," we must not consider them solely in that light since "they vindicate public, not private rights." *Virginia Electric & Power Co.* v. *NLRB*, 1943, 319 U.S. 533, 543 * * *. The fact that the

[25] *Morrison-Knudsen Co.* v. *National Labor Relations Board*, 275 F. 2d 914 (C.A. 2), petition for certiorari pending, No. 120, this Term.

union imposed in the *Virginia Electric case* was company-dominated does not appear to be a valid distinction here * * *, and we see no other * * *.[26]

C. The reimbursement remedy is proper though it does not take into account the benefits which the employees may have received from the dues and fees paid to the union

Petitioners further contend (Br. 29–32) that the Board's reimbursement order is invalid because it fails to deduct the benefits which the employees may have obtained from the union as a result of the dues and fees paid. This contention is likewise answered by *Virginia Electric*. In rejecting the argument that the employees had received some benefits from the Union there, which had obtained a substantial wage increase for them, the Court stated (319 U.S. at 544): "'it is manifestly impossible to say that greater benefits might not have been secured if the [employees'] freedom of choice * * * had not been interfered with.'" And, it added (*ibid.*): "The fact that the Board may only have approximated its efforts to make the employees whole, because of asserted benefits of dubious and unascertainable nature flowing from the [union], does not convert this reimbursement order into the imposition of a penalty." Moreover, even if the benefits "purchased" with

[26] See also, *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters*, 279 F. 2d 83, 86–88 (C.A. 2); *Paul M. O'Neill* v. *National Labor Relations Board*, 46 LRRM 2503 (C.A. 3); *Dixie Bedding Co.* v. *National Labor Relations Board*, 268 F. 2d 901, 907 (C.A. 5); *Local Lodge No. 1424* v. *National Labor Relations Board*, 264 F. 2d 575, 582 (C.A. D.C.), reversed on other grounds, 362 U.S. 411.

the fees and dues paid to the union could be accurately ascertained, the Board would still be warranted in not deducting their cost from the sums required to be refunded. The monies collected under the illegal hiring arrangement went for a group of benefits, which were not severable. That is, along with a job, the employee may have obtained certain other union benefits. But, he could not pick and choose what he would receive for the dues and fees paid; he bought either the whole package or none of it. Since the hiring arrangement was an illegal means of exacting the fees and dues, it could not have been used to purchase any part of the package, no matter how beneficial. It could scarcely be suggested, for example, that, in a closed shop situation, such as existed here, the wages earned from the job obtained under the illegal system should be deducted from the dues refunded to the employee simply because the job and the wages were a benefit of union membership; the other benefits obtained stand on no different footing. Therefore, it is proper that a refund of the entire amount collected pursuant to the illegal arrangement be ordered, without any allowance for collateral benefits obtained.

Moreover, it should be noted that the employees suffered injury which the Board's order does not seek to remedy in a monetary sense, which may well offset any advantage gained from not deducting the cost of collateral benefits from the amount of dues and fees refunded. The Board's order seeks only to restore monies collected under the illegal arrangement. It does not undertake to evaluate or remedy

by reimbursement the additional loss sustained by the employees from the deprivation of their statutory right to refrain from union activities, if they so desired, or to select a representative of their own choice. "Since no consideration has been given * * * to collateral *losses* in framing an order to reimburse employees * * *, manifestly no consideration need be given to collateral benefits which employees may have received." *Gullett Gin Company* v. *National Labor Relations Board*, 340 U.S. 361, 364.

Nor can petitioners be relieved of the responsibility for refunding dues and fees which were unlawfully collected by pleading hardship (Un. Br. 30–31. There is no reason to believe that the amount required to be refunded in this case will reach the astronomical proportion envisaged by the AFL–CIO in its Amicus Brief (pp. 18–19); see also Un. Br. 34. The reimbursement order here is limited to those employees whom Mechanical Handling obtained from petitioners, including Local 60, pursuant to the illegal arrangement involved in this case (R. 7–8). So far as appears from the record, employees were obtained from Local 60 only for the Ford job. Moreover, it appears that the Company's work at the Ford plant lasted about 6 months and during that time about 25 millwrights were employed (R. 40, Tr. 92). Assuming, as is unlikely, that all 25 were employed for the full period, and, accepting petitioners' assumption that they were old-time union members and thus had paid initiation fees to the union more than six months prior to the filing of the charges herein and before being subjected to the illegal ar-

rangement, a refund would appear to be required of only the dues they paid to the union during the period of the Ford job. This would total about $525.00.[27] In any event, if petitioners experience difficulty in raising the money required to be refunded, this is a problem which can be worked out at the compliance stage.[28]

CONCLUSION

For the foregoing reasons, the judgment of the court below enforcing the reimbursement provisions of the Board's order should be affirmed. Moreover, the judgment of the Court in No. 85, denying enforcement of the reimbursement provisions of the Board's order in that case, should be reversed.

Respectfully submitted.

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I authorize the filing of this brief.

J. LEE RANKIN,
Solicitor General.

OCTOBER 1960.

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[27] Monthly dues were $3.50 (R. 95).

[28] In the past, where reimbursement orders have proved burdensome to a respondent, arrangements have been negotiated, including installment payment plans.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth on p. 2, *supra*, are as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of

competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * * *

UNFAIR LABOR PRACTICES

SEC. 8. * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

U.S. GOVERNMENT PRINTING OFFICE, 1950

SUPREME COURT OF THE UNITED STATES

No. 68.—October Term, 1960.

Local 60, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, et al., Petitioners, v. National Labor Relations Board.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 17, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, United Brotherhood, entered into a contract with Mechanical Handling Systems, Inc. (which we will call the Company), whereby the Company agreed to work the hours, pay the wages, abide by the rules and regulations of the union applicable to the locality where the work is done, and employ members of the union.

The Company, undertaking work at Indianapolis, agreed to hire workers on referral from a local union, one of the petitioners in this case. Two applicants from another local union were denied employment by the Company because they could not get referral from petitioner local union.

The Board found that petitioners had violated § 8 (b)(1)(A) and § 8 (b)(2) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 141, as amended, 29 U. S. C. § 158, in maintaining and enforcing an agreement which established closed shop preferential hiring conditions and in causing the Company to refuse to hire the two applicants. 122 N. L. R. B. 396.

After granting other relief the Board said:

> "As we find that dues, non-membership dues, assessments, and work permit fees,[1] were collected under the illegal contract as the price employees paid in order to obtain or retain their jobs, we do not believe it would effectuate the policies of the Act to permit the retention of the payments which have been unlawfully exacted from the employees."

It added that the remedial provisions "are appropriate and necessary to expunge the coercive effect" of petitioners' unfair labor practices.

On application of the Board, the Court of Appeals enforced the order. 273 F. 2d 699. The case is here on a writ of certiorari, 363 U. S. 837, in which petitioners challenge no part of the Board's order except the refund provision.

The provision for refund in this case is the product of a rule announced by the Board in the *Brown-Olds* case, 115 N. L. R. B. 594, which involved the use of a closed-shop agreement despite the ban in the Taft-Hartley Act. In that case a panel of three members of the five-member Board found a violation of the closed-shop provision of the Act. Two of the three agreed to an order of reimbursement to all employees for any assessments collected by the union within the period starting from six months prior to the date of the filing of the charge. One member, Ivar H. Peterson, dissented, saying that the reimbursement was inappropriate since there was an absence of "specific evidence of coercion and evidence that payments

[1] The monthly dues payable to the local union were $3.50 and the iniation fee $125. Dues and fees in lesser amounts were payable by apprentices. A member who is working within the jurisdiction of a district council who has not transferred his membership to a local union of the council pays for a working permit that is not less than 75 cents a month nor more than the local monthly dues.

were required as a condition of employment." *Id.*, 606. Later that remedy was extended to hiring arrangements, which, though not operating in connection with a closed shop, were felt by the Board to have a coercive influence on applicants for work to join the union. *Los Angeles-Seattle Motor Express, Inc.*, 121 N. L. R. B. 1629.

In neither of those cases nor in the present case was there any evidence that the union membership, fees, or dues were coerced. The Board as well as the Court of Appeals held that fact to be immaterial. Both said that the case was governed by *Virginia Electric Co.* v. *Labor Board*, 319 U. S. 533; and the Court of Appeals added that coercion was to be inferred as "there was present an implicit threat of loss of job if those fees were not paid." 273 F. 2d, at 703. The Board argues, in support of that position, that reimbursement of dues where hiring arrangements have been abused is protective of rights vindicated by the Act and authorized by § 10 (c).[2]

We do not think this case is governed by *Virginia Electric Co.* v. *Labor Board*, *supra*. That case involved a company union whose very existence was unlawful. There were, indeed, findings that the union "was not the result of the employees' free choice" (319 U. S., at 537), and that the employees had to remain members of the union to retain their jobs. *Id.*, 540. Return of dues was one of the means for disestablishing an unlawful

[2] Section 10 (c) provides in relevant part:

". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . ."

union. *Id.*, 541. Cf. *Labor Board* v. *Mine Workers*, 335 U. S. 453, 458–459.

The unions in the present case were not unlawfully created. On the record before us they have engaged in prohibited activity. But there is no evidence that any of them coerced a single employee to join the union ranks or to remain as members. All of the employees affected by the present order were union members when employed on the job in question. So far as we know they may have been members for years on end. No evidence was offered to show that even a single person joined the union with the view of obtaining work on this project. Nor was there any evidence that any who had voluntarily joined the union was kept from resigning for fear of retaliatory measures against him. This case is therefore quite different from *Radio Officers* v. *Labor Board*, 347 U. S. 17, 48, where, discrimination having been shown, the inferences to be drawn were left largely to the Board.

The Board has broad discretion to adapt its remedies to the needs of particular situations so that "the victims of discrimination" may be treated fairly. See *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. But the power of the Board "to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 236. Where no membership in the union was shown to be influenced or compelled by reason of any unfair practice, no "consequences of violation" are removed by the order compelling the union to return all dues and fees collected from the members; and no "dissipation" of the effects of the prohibited action is achieved. *Labor Board* v. *Mine Workers*, *supra*, 463. The order in those circumstances becomes punitive and

beyond the power of the Board.[1] Cf. *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7, 10. As Judge Pope said in *Morrison-Knudsen Co.* v. *Labor Board*, 276 F. 2d 63, 76, "reimbursing a lot of old-time union men" by refunding their dues is not a remedial measure in the competence of the Board to impose, unless there is support in the evidence that their membership was induced, obtained, or retained in violation of the Act. It would be difficult, even with hostile eyes, to read the history of trade unionism except in terms of voluntary associations formed to meet pressing needs in a complex society.[2]

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

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[1] Accord: *Morrison-Knudsen Co.* v. *Labor Board*, 275 F. 2d 914 (C. A. 2d Cir.); *Labor Board* v. *United States Steel Corp.*, 278 F. 2d 896 (C. A. 3d Cir.); *Labor Board* v. *Local Union No. 85*, 274 F. 2d 344 (C. A. 5th Cir.); *Labor Board* v. *International Union*, 279 F. 2d 951 (C. A. 8th Cir.); *Morrison-Knudsen Co.* v. *Labor Board*, 276 F. 2d 63 (C. A. 9th Cir.); *Local 357* v. *Labor Board*, 275 F. 2d 646 (C. A. D. C. Cir.). Cf. *Labor Board* v. *Carpenters Local*, 276 F. 2d 583 (C. A. 1st Cir.); *Perry Coal Co.* v. *Labor Board*, 284 F. 2d 810 (C. A. 7th Cir.).

[2] See Millis and Montgomery, Organized Labor, Vol. III (1945), c. VIII.

SUPREME COURT OF THE UNITED STATES

No. 68.—October Term, 1960.

Local 60, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, et al., Petitioners, v. National Labor Relations Board.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 17, 1961.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, concurring.

While I agree with the Court that *Virginia Electric & Power Co.* v. *Labor Board*, 319 U. S. 533, does not justify the Board's "Brown-Olds" remedy as it has been applied in this and other cases, I think the Board is entitled to be informed more fully why that should be so, since it may fairly be said that *Virginia Electric* could be taken as having invited the course the Board has been following. In joining the Court's opinion I shall therefore add some further views.

The Brown-Olds remedy is an order made under § 10 (c) of the National Labor Relations Act which authorizes the Board, after finding an unfair labor practice, not only to issue a cease and desist order but also "to take such affirmative action . . . as will effectuate the policies of this Act. . . ." The remedy, which seems only to be applied if the unfair labor practice amounts either to employer domination of a union [§ 8 (a)(2)] or discrimination in favor of union membership by an agreement between employer and union [§ 8 (a)(3); § 8 (b)(2)], typically requires that either the union or the employer reimburse all employees in the amount of all moneys paid in dues, assessments, etc., since six months before the unfair labor practice charge was filed. The

Board does not admit defensive evidence that some employees voluntarily made such payments. An illegal closed shop or discriminatory hiring practices create an irrebuttable presumption of coercion. See, *e. g.*, *Brown-Olds Plumbing & Heating Corp.*, 115 N. L. R. B. 594; *Saltsman Construction Co.*, 123 N. L. R. B. 1176; *Nassau & Suffolk Contractors' Assn.*, 123 N. L. R. B. 1393; *Lummus Corp.*, 125 N. L. R. B. 1161.

The provision that the Board was to be allowed "to take such affirmative action . . . as will effectuate the policies of this Act . . ." did not pass the Wagner Act Congress without objection to the uncontrolled breadth of this power. See Hearings before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess. 448–449. This Court's construction of the scope of the power has reflected a similar concern. The Board has been told that it is without power to "effectuate the policies of this Act" by assessing punishments upon those who commit unfair labor practices. *Republic Steel Corp. v. Labor Board*, 311 U. S. 7, 11, 12. The primary purpose of the provision for other affirmative relief has been held to be to enable the Board to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice. *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 236. Thus in *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, this Court reversed the Board for refusing to allow an employer to show in mitigation of a back-pay order that the employee unjustifiably refused to take desirable new employment during the period. In *Republic Steel, supra*, the Court refused to enforce an order requiring the employer to pay the full amount of back pay to an employee who had been paid to work for the Work Projects Administration in the meantime. In *Labor Board* v. *Seven-Up Co.*, 344 U. S. 344, the Court indicated that even an otherwise sensible procedure for com-

puting back pay of an employee discriminatorily discharged must provide exceptions where the scheme would more than compensate the employee because of the seasonal nature of the employer's business.

The Board now emphasizes that its Brown-Olds remedy has a substantial tendency to deter employer-union encouragement of union membership in violation of §§ 8 (a)(3) and 8 (b)(2). But it also correctly recognizes that in light of the *Republic Steel* case, *supra*, it must show more than that the remedy will tend to deter unfair labor practices. The Board must establish that the remedy is a reasonable attempt to put aright matters the unfair labor practice set awry. As I understand its contentions, the Board attempts to make this showing by arguing that wherever there has been a not insignificant unlawful encouragement to union membership all members should be taken to have been under the influence of coercion, whether or not they were aware of this influence or would have acted differently without it. The employees are said to have been coerced in much the same sense that a man contentedly sitting in the living room of his house may be said to be imprisoned by the barring of the doors whether or not he wants to leave. Accordingly, the Board has considered unnecessary an actual showing of employee unwillingness to belong to the union.

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[1] It is but another formulation of the same argument when the Board, in its brief, states that actual coercion is not required so long as the dues are collected pursuant to an illegal system: "The validity of a reimbursement order is not contingent upon a showing that the employees paid monies to the union unwillingly. If the money were paid pursuant to an arrangement which violated the statute, it can be ordered refunded provided this would best effectuate the statutory policies . . . . That the money may have been collected anyhow by a legal means does not privilege the use of an illegal procedure to obtain it."

What we must decide, then, is whether it is within the power of the Board to provide dues-reimbursement relief for this type of imputed coercion, or, as the Board alternatively states its case, for the employee's loss of his statutory right to decide freely whether or not he shall be a union member. This issue is not satisfactorily resolved by simply pointing out that there has been no showing of forced payment of dues an employee was unwilling to pay, for, unless I misunderstand the Board, it is arguing that even a willing union member loses something when there is a violation of § 8 (b)(2), namely the freedom of choice which the statute assures him. Nor, once we have recognized that a tendency to deter unfair labor practices is not alone sufficient justification for a Board order of affirmative relief, does the concept of punitiveness really advance a solution. Deterrence is certainly a desirable, even though not in itself a sufficiently justifying effect of a Board order.

I think the Board should be denied the use of its Brown-Olds remedy in situations where, as here, it is not unlikely that a substantial number of employees were willing to pay dues for union membership because, as I see it, the amount of dues or other exactions paid is not a tenable way of estimating the value a willing union member would place on his right to choose freely whether or not he would be or remain a union member—as it were, on his right to change his mind. The amount of dues paid does perhaps provide a means of estimating the value of benefits received from the union. Or the amount of dues paid does perhaps measure the cost coercion imposes upon an employee who, if free to choose, would be unwilling to join the union (although even in this case a proper adjustment might have to take some account of the union benefits the employee would not have received had he been merely a nonunion employee in a unionized bargaining unit). But I can find no rational relationship at all

between the amount of dues paid and the value an employee, who is willing to join a union, would place on his freedom to change his mind.[*] In the absence of a showing of such a relationship the Board's Brown-Olds order can no more be sustained than could its orders in the *Phelps Dodge* or *Republic Steel* cases.

A different result might follow in this case if *Virginia Electric* had held that such a relationship exists. But I think that case held only that, as a matter of statutory policy, an employee could not *ever* be deemed a willing member of a company dominated union, cf. *Matter of The Carpenter Steel Co.*, 76 N. L. R. B. 670, and that, on considerations of practicality, the employer who had violated the Act should bear the unapportionable costs of sustaining a union that served the employer's forbidden purposes at least as much as it served the employee's legitimate ones.

[*] For example, an employee may be more willing to join a union which charges high dues and provides substantial benefits than a union which charges little and gives little. But the Board formula assures that in the case where the dues are higher the value of the loss of freedom of choice is greater.

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Mr. Justice Whittaker, dissenting.

The contract involved here not only required persons seeking employment in the unit to be members of the union, but also required each of them to obtain from the "Council" and present to the "union steward" on the job a "work permit" before going to work. That this closed-shop hiring arrangement "coerce[d] employees in the exercise of the rights guaranteed in section 7," and "cause[d] [the] employer to discriminate against . . . employee[s] in violation of subsection (a)(3) of" the Act, contrary to the explicit provisions of §§ 8 (b)(1)(A) and 8 (b)(2) of the Act, 29 U. S. C. § 158, is not here denied.

To assure protection and enforcement of the rights it had guaranteed to employees by the Act, Congress provided in § 10 (c) that, upon the finding of an "unfair labor practice," "the Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies" of the Act.

Finding that the closed-shop hiring arrangement involved here violated §§ 8 (b)(1)(A) and 8 (b)(2) of the Act and thus constituted an unfair labor practice, the

Board, in fashioning a remedy which it deemed "necessary to expunge the coercive effect" of the violations and to "effectuate the policies of the Act," ordered the unions not only to cease the violations but also "to refund to the employees involved the dues . . . and work permit fees paid by the employees as a price for their employment." The only question here is whether that remedy was within the Board's power. Like the Court of Appeals, I think it was.

Congress knew, of course, that it could not foresee the nature of all possible violations of the Act, and accordingly did not undertake to specify the precise remedy to be visited upon offenders for particular violations.

> "[I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion . . . .
>
> "The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194.

To hold that the Board is without power to do more than order the unions not to violate the Act in the future would be to deny any remedy whatever for violations.

It is certain that Congress did not intend by the Act "to hold out to [employees] an illusory right for which it was denying them a remedy." *Graham* v. *Brotherhood of Firemen*, 338 U. S. 230, 240. In directing the Board to order "such affirmative action . . . as will effectuate the policies of the Act," Congress seems clearly to have directed the Board to fashion and enforce a remedy "which it . . . deem[s] adequate to that end." *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7, 12.

In "fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *Labor Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346. And see *Radio Officers Union* v. *Labor Board*, 347 U. S. 17, 49. Based on its long experience up to 1956, that, despite the ban which the Taft-Hartley Amendments had imposed nine years earlier, closed-shop practices were still being followed in some industries,[1] the Board concluded that a remedy more effective than a cease-and-desist order was required. And, following the teaching of this Court's opinion in

[1] As two apparently disinterested authorities have noted:

"By 1945, the closed shop had become one of the basic features of industrial relations in the building industry. This situation has largely remained true in practice up to the present time, despite the passage of legislation in 1947 prohibiting this type of provision from being included in collective agreements.

"In all of the strongly unionized areas studied during the summer of 1952, employment arrangements equivalent to those under a closed shop were in effect. Membership in the union was almost universally regarded as a prerequisite for obtaining employment. In most instances men were employed directly or indirectly through the union itself. *Both parties viewed this as standard practice and showed little or no concern for the illegality of the arrangement.*" Slichter and Levinson, Labor Relations and Productivity in the Building Trades (Univ. of Michigan, 1956), pp. 62, 74. (Emphasis added.)

Virginia & Electric Power Co. v. *Labor Board*, 319 U. S. 533, the Board decided that an appropriate additional remedy would be to require that the moneys paid to the union under the illegal arrangement be refunded to the employees, and it accordingly so held in 1956 in *United Association of Journeymen, etc.*, and *Brown-Olds Plumbing & Heating Corp.*, 115 N. L. R. B. 594.[2]

In *Virginia Electric & Power Co.* v. *Labor Board*, *supra*, this Court had upheld an identical remedy as within the Board's power. There an employer had committed an unfair labor practice by dominating a plant union in violation of § 8 (1), (2) and (3) of the Act. In fashioning a remedy that it deemed necessary to effectuate the policies of the Act, the Board ordered the employer not only to cease the practice but also to reimburse its employees for the dues withheld from their wages, pursuant to their signed authorizations, and paid

[2] The Board there stated:

"[T]he Taft-Hartley amendments have made unlawful all closed-shop contracts as contrary to public policy, proscribing such conduct by unions as unfair labor practices. The dues required and collected under such a contract . . . contravene that public policy. It is no longer required by the Act that the union be company-dominated in order for collection of dues to be unlawful under a closed-shop contract. Here, the dues and assessments were required and collected pursuant to a contract which clearly contravened the public policy of the Act. Dues and assessments here collected constituted the price these employees paid in order to retain their jobs. We therefore conclude that the remedy of reimbursement of all such moneys is appropriate and necessary to expunge the illegal effects of the unfair labor practices found here.

"It is our view that, where payment of dues is required under a closed-shop contract, as where assessments are required under an otherwise valid agreement, reimbursement of such moneys actually collected will best effectuate the policies of the Act. Otherwise, the very fruits of the unfair labor practice itself will remain in the hands of the respondent." 115 N. L. R. B., at 600-601.

to the union. Rejecting the employer's contention that this remedy was in excess of the Board's power, this Court said:

> "[T]he Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 187–89. The particular means by which the effects of unfair labor practices are to be expunged are matters for the Board not the courts to determine. *I. A. of M.* v. *Labor Board*, *supra*, at p. 82; *Labor Board* v. *Link-Belt Co.*, *supra*, at p. 600. Here the Board, in the exercise of its informed discretion, has expressly determined that reimbursement in full of the checked-off dues is necessary to effectuate the policies of the Act. We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. There is no such showing here." 319 U. S., at 539–540.

Such an order, said the Court, "returns to the employees what has been taken from them" and restores to them "that truly unfettered freedom of choice which the Act demands." 319 U. S., at 541. Surely, it is as correct to say here, as it was there, that "An order such as this, which deprives [a union] of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy," *ibid.*, and that is all the order here purports to do.

It is argued that the *Virginia* case is distinguishable on the ground that it dealt with an employer-dominated union. But the question is one of power. The fact that

the unfair labor practice there was by the employer rather than by the union, as here, is not a distinguishing difference. Nor does the fact that employees' rights were there infringed by a violation of § 8 (1), (2) and (3) of the Act, whereas they are here infringed by a violation of §§ 8 (b) (1) (A) and 8 (b) (2) of the Act, make any difference. In each instance the violation constituted an unfair labor practice, and the question is whether, in fashioning a remedy to effectuate the policies of the Act, the Board has power, in its informed discretion, to order reimbursement of the dues paid under the illegal arrangement. It would seem that if the Board had power so to order in the *Virginia* case, as this Court held, it similarly has power so to order in this case. Nothing in the *Virginia* case appears to limit the Board's power of restitution to cases involving employer-dominated unions or to any other particular type of violation, but the power seems clearly enough to be invocable in any appropriate case, in the informed discretion of the Board, and such has been the understanding of the courts.[3]

The contentions that such an order of restitution is beyond the Board's power because the employees received some benefits from the union, despite the illegal hiring arrangement, and that, to allow restitution of the dues collected by the union under the illegal arrangement would be to enforce a "penalty" which the Board has no power to assess, were fully answered to the contrary in the *Virginia* case, 319 U. S., at 542–543.

To require specific proof of individual injury to all employees "would impose impossible administrative burdens." *Labor Board* v. *Revere Metal Art Co.*, *supra*,

[3] *Labor Board* v. *Revere Metal Art Co.*, 280 F. 2d 96, 101 (C. A. 2d Cir.); *Labor Board* v. *Local 294, International Brotherhood of Teamsters*, 279 F. 2d 83, 86–88 (C. A. 2d Cir.); *Paul M. O'Neill* v. *Labor Board*, 46 L. R. R. M. 2503 (C. A. 3d Cir.); *Dixie Bedding Co.* v. *Labor Board*, 268 F. 2d 901, 907 (C. A. 5th Cir.).

at 101, and prevent effective enforcement of the Act. Hence that character and fullness of proof is not required. See *Radio Officers Union* v. *Labor Board*, 347 U. S. 17, 48–52. And inasmuch as the General Counsel of the Board may issue complaints only upon charges filed with him, *id.*, at 53, and the Board's experience seems to have proved that only a few employees will be sufficiently daring and determined overtly to complain regardless of the nature of the violation, it would seem that the Board, in the exercise of its informed discretion, may reasonably conclude, even in the absence of specific proof of injury to all the employees, that full restitution of the dues collected by the union under an illegal arrangement is necessary to effectuate the policies of the Act.

For these reasons, I think the Board acted within its power in ordering restitution of the dues collected under the admittedly illegal arrangement here, that the Court of Appeals correctly enforced the order, and that its judgment should be affirmed.